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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RICHARD NIXON,

Petitioner,

v.

A. ERNEST FITZGERALD,

Respondent.

BRYCE N. HARLOW
AND
ALEXANDER P. BUTTERFIELD,

Petitioners,

v.

A. ERNEST FITZGERALD,

Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER RICHARD NIXON

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QUESTIONS PRESENTED

1. Whether a President is absolutely immune from personal liability in civil damages for his actions (or failures to act) as President.

2. Whether an order by a district court denying a President's defense of absolute immunity from civil damages is immediately appealable as a collateral order.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT 3

1. Introduction And Overview 3
2. Fitzgerald's Congressional Testimony On The C-5A 5
3. Alleged Retaliation By The Air Force 6
4. The Abolition Of Fitzgerald's Job 6
5. Opposition By Some Members Of The White House Staff To The Air Force Decision 8
6. President Nixon's December 8, 1969, Press Conference 9
7. President Nixon's Efforts To Assist Fitzgerald 10
8. Secretary Seamans' Invocation Of Executive Privilege And The President's 1973 Press Conference 11
9. The CSC Decision 12
10. Fitzgerald's Complaints In This Action 13
11. Pretrial Proceedings 14
12. The Decision Of The District Court 14
13. Proceedings In The Court Of Appeals 15

SUMMARY OF ARGUMENT 16

ARGUMENT 19

I. The District Court's Ruling On Former President Nixon's Absolute Immunity Defense Was An Appealable "Final Decision" 19

II. The President Has Historically Been Recognized As Immune From Civil Liability 22

Page

A. The Original Understanding 23

B. The Absence Of Civil Suits Against the President 26

III. Absolute Presidential Immunity Is "Essential For The Conduct Of The Public Business" 28

A. The Public's Interest In The "Vigorous And Fearless" Performance Of Presidential Duties 30

B. The President's Susceptibility To Civil Suit 31

C. The Burdens Of Modern Litigation 34

D. The Inhibiting Effect Of Potential Liability 38

E. The Interests Of Potential Plaintiffs 39

F. The Inadequacy Of Qualified Immunity 41

G. The Balance 42

IV. Absolute Presidential Immunity Is A Proper Means Of Safeguarding The Integrity Of The Executive Branch 44

V. The Claims Against Former President Nixon In This Case Are Precluded By Absolute Presidential Immunity 48

CONCLUSION 50

TABLE OF AUTHORITIES

Cases: *Page*

Abney v. United States, 431 U.S. 651 (1977) 15, 19, 20

ACF Industries, Inc. v. EEOC, 439 U.S. 1081 (1979) 36

Barr v. Matteo, 360 U.S. 564 (1959) 27, 34, 48, 50

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 36

Bohmer v. Nixon, Civ. No. 75-A-T (S.D. Cal. June 21, 1976) 27, 32

Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872) 16, 22, 31, 41, 50

Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978) 21, 49

Butz v. Economou, 438 U.S. 478 (1978) ..... *passim*

Carlson v. Green, 446 U.S. 14 (1980) 33

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 15, 19

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 15, 19

Dames & Moore v. Regan, 49 U.S.L.W. 4969 (U.S. June 24, 1981) (No. 80-2078) 30, 40

Davis v. Nixon, Civ. No. 73-1520-LTL(G) (C.D. Cal. June 18, 1974) 27

Davis v. Passman, 442 U.S. 228 (1979) 33

Daughtrey v. Carter, 584 F.2d 1050 (D.C. Cir. 1978) 28

Dellums v. Powell, No. 80-1331 (D.C. Cir. July 24, 1981) 21

Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976) 28

Doe v. McMillan, 412 U.S. 306 (1973) 18, 27, 42

Dole v. Carter, 569 F.2d 1109 (10th Cir. 1977) 28

Dombrowski v. Eastland, 387 U.S. 82 (1967) 20

Edwards v. Carter, 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978) 28

Cases, continued: *Page*

Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974) 13

Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977) 13

Fonda v. Nixon, Civ. No. 73-2442-MML (C.D. Cal. May 23, 1974) 27, 32

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Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated mem.*, 444 U.S. 996 (1979) 28

Gomez v. Toledo, 100 S. Ct. 1920 (1980) 41

Gravel v. United States, 408 U.S. 606 (1972) 45

Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) 17, 31, 38, 40, 43

Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by equally divided Court*, No. 79-880 (June 22, 1981) ..... *passim*

Helstoski v. Meanor, 442 U.S. 500 (1979) 15, 19, 20

Herbert v. Lando, 441 U.S. 153 (1979) 18, 36

Humphrey's Executor v. United States, 295 U.S. 602 (1935) 28, 45

Imbler v. Pachtman, 424 U.S. 409 (1976) ..... *passim*

Kilbourn v. Thompson, 103 U.S. 168 (1881) 45

Livingston v. Jefferson, 15 Fed. Cas. 660 (No. 8,411) (1811) 26

McSurely v. McClellan, 521 F.2d 1024 (D.C. Cir. 1975), *aff'd in pertinent part en banc*, 553 F.2d 1277 (D.C. Cir. 1976), *cert. dismissed*, 438 U.S. 189 (1978) 21

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Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1875) 26

Cases, continued: Page

Myers v. United States, 272 U.S. 52 (1926) 28

National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974) 28

National Treasury Employees Union v. Reagan, No. 81-1294 (D.C. Cir. August 11, 1981) 28, 49

New York Trust Co. v. Eisner, 256 U.S. 345 (1921) 22

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 45

People Versus PORN (Profit of Richard Nixon) v. Nixon, No. 80-1720, *cert. denied*, 49 U.S.L.W. 3911 (U.S. June 9, 1981) 32

Pierson v. Ray, 386 U.S. 547 (1967) 16, 22, 32, 50

Reese v. Nixon, 347 F. Supp. 314 (C.D. Cal. 1972), *aff'd in pertinent part*, No. 72-3070 (9th Cir. May 3, 1974) 27

Spalding v. Vilas, 161 U.S. 483 (1896) 27, 48, 50

Stump v. Sparkman, 435 U.S. 349 (1978) 49

Tenney v. Brandhove, 341 U.S. 367 (1951) . . . . . *passim*

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 33

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 33

United States v. Brewster, 408 U.S. 501 (1972) 40, 45

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1926) 30

United States v. Helstoski, 442 U.S. 477 (1979) 47

United States v. Johnson, 383 U.S. 169 (1966) 19, 44, 45

United States v. Nixon, 418 U.S. 683 (1974) 19, 46, 47

United States v. Reynolds, 345 U.S. 1 (1935) 50

Wood v. Strickland, 420 U.S. 308 (1975) 18, 41

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 28

Page

Constitutional Provisions:

U.S. Const., Art. I, § 3 40
§ 7 30
U.S. Const., Art. II, § 1 30
§ 2 30
§ 4 40

Statutes and Court Rules:

5 U.S.C. § 2102 49
§ 2103 49
§ 7211 . . . . . 3, 13, 15, 33, 44
10 U.S.C. § 8012 49
18 U.S.C. § 1505 . . . . . 3, 13, 15, 33, 44
28 U.S.C. § 1254 . . . . . 2, 21
§ 1291 . . . . . 3, 19
Rule 26(b), F.R.Civ.P. 38

Regulations:

5 C.F.R. § 213.3109 49
§ 6.3 49
28 C.F.R. § 50.15 35

Miscellaneous:

Director of the Administrative Office of the United States Court, *Annual Report*, Table 28 (1980) 33

II J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836) 24

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No. 67 23

No. 77 . . . . . 16, 24

Miscellaneous, continued: Page

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BRIEF FOR PETITIONER RICHARD NIXON

OPINIONS BELOW

The district court's order of March 26, 1980, denying Petitioner Nixon's motion for summary judgment based on absolute Presidential immunity (Nixon Pet. App. A, 1a-5a), is not officially reported.[1] The order of the

[1]The forms used for record citations in this brief are as follows: to the appendices to Mr. Nixon's Petition for Certiorari, "Nixon

[footnote continued]

court of appeals granting Respondent's motion to dismiss Petitioner Nixon's appeal from the district court's order (Nixon Pet. App. D, 35a-36a) is not yet officially reported.

JURISDICTION

The district court entered its order denying Petitioner Nixon's motion for summary judgment on the grounds, *inter alia*, of absolute immunity from civil damage liability (Nixon Pet. App. 1a-5a) on March 26, 1980. The judgment of the court of appeals dismissing Petitioner Nixon's timely appeal from this order (Nixon Pet. App. D, 35a-36a) was filed on April 30, 1980. Mr. Nixon's Petition for a Writ of Certiorari was filed on May 2, 1980. By order dated June 22, 1981, this Court granted the Petition filed on behalf of former President Nixon and the Petition for a Writ of Certiorari filed by Petitioners Harlow and Butterfield, and consolidated the cases for briefing and argument.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals to review the order denying Petitioner Nixon's absolute

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Pet. App. ___"; to appendices to the Petition for Certiorari filed by Petitioners Harlow and Butterfield, "Harlow Pet. App. ___"; to the Joint Appendix, "JA ___"; to transcripts of depositions "[Deponent] Dep. (R. ___) ___"; to plaintiff's and defendants' exhibits to depositions, "PX ___" and "DX ___" (followed by a further citation to the deposition with which they are lodged and the pages at which they are identified or discussed); and to other record materials "R. _____." The depositions of Mr. Nixon, H. R. Haldeman, and Robert Seamans are in separately-paginated volumes. Citations to these depositions include volume numbers followed by page numbers. Citations in the form "R. ___" refer to documents which are listed and numbered in the district court docket entries reprinted in the Joint Appendix (JA 1a-53a).

immunity defense rested on 28 U.S.C. § 1291, which authorizes appeals of such "collateral orders." *See* pp. 19-21, *infra.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291 provides:

§ 1291. Final decisions of district courts

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Other pertinent Constitutional and statutory provisions include the First Amendment to the United States Constitution, 18 U.S.C. § 1505, and 5 U.S.C. § 7211. They are reproduced in Nixon Pet. App. B, pp. 11a-12a.

STATEMENT

1. *Introduction And Overview*

This case raises an issue of paramount importance to our nation's past, present and future Chief Executives, as well as the people whom they serve: whether a President can be held liable in civil damages for his actions in office. In this civil action seeking compensatory and punitive damages, the district court denied a motion by Petitioner Richard Nixon for summary judgment based on absolute Presidential immunity, and the court of appeals dismissed his appeal from that order.

The merits of the case revolve around the Respondent's claim that he was the victim of a conspiracy, allegedly

spanning several Administrations and involving as many as seventeen individuals, to punish him for controversial testimony before a Congressional committee on cost overruns on the C-5A transport plane. According to the Respondent, civilian Air Force cost analyst A. Ernest Fitzgerald, the conspiracy began among Air Force officials immediately following his testimony in late 1968, and was responsible for his allegedly retaliatory termination, under the guise of a reorganization, in late 1969. President Nixon, who took office in January 1969, was alleged to have joined the conspiracy because of his supposed unhappiness with Fitzgerald's criticism of defense spending and to have approved his termination, either before or after the fact.

Throughout extended litigation on Fitzgerald's allegations, officials of the Department of Defense vigorously denied that Fitzgerald's termination was motivated by his Congressional testimony, and their position was credited by the Civil Service Commission in an administrative proceeding initiated by Fitzgerald to review the termination.[2] Likewise, Mr. Nixon has disavowed any role in Fitzgerald's loss of his job and other problems with the Defense Department; these denials are buttressed by his documented efforts to assist Fitzgerald to obtain employment within the White House Office itself at the very time the former President is alleged to have been engaged in efforts to punish him.

In the district court, the dispute on the merits between Fitzgerald and former President Nixon focused in particular on statements Mr. Nixon made, some three years after the fact, in a Presidential press conference and in several

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[2]JA 60a-89a.

brief tape-recorded conversations with White House advisors. Fitzgerald's position is that the former President's public statement, in which he declared himself responsible for Fitzgerald's termination, was a truthful admission, notwithstanding its prompt retraction. Mr. Nixon's position, borne out by his recorded conversations with his aides, is that during the press conference he confused the Fitzgerald matter, then three years in the past, with a more recent dispute involving another Defense Department employee, and that the prompt retraction stated the true facts.

Of course, in the context of the issues before this Court, disputes on the merits of Fitzgerald's claims are only tangentially relevant. If, as we demonstrate, Presidents are absolutely immune from civil damage liability for their official actions, that immunity would be available on any conceivable understanding of the facts. Accordingly, the remainder of this Statement is limited to a brief review of the facts and lengthy procedural history of the case, with a focus on former President Nixon's actions.

2. *Fitzgerald's Congressional Testimony On The C-5A*

In 1968, the last full year of President Johnson's term, Fitzgerald was a civilian cost analyst in the Department of the Air Force. After several private conversations with a member of the staff of Congress' Joint Economic Committee (Kaufman Dep. (R. 472) 27), Fitzgerald was invited to give public testimony before a subcommittee chaired by Senator William Proxmire. On November 13, 1968, Fitzgerald appeared and testified that cost overruns on the C-5A transport plane could approximate $2 billion. *Hearings Before the Subcommittee on Econ-*

omy in Government of the Joint Economic Committee, 90th Cong., 2d Sess., 200 (1968).

3. *Alleged Retaliation By The Air Force*

Fitzgerald claims that his relationships with Defense Department officials in the Johnson Administration deteriorated in the months following his testimony and that he was the subject of various retaliatory actions. He alleges that these actions included the revocation of his tenure (R. 28 (Affidavit of A. Ernest Fitzgerald), ¶ 35), critical comments from superiors (*id.* at ¶¶ 40, 42), cutbacks in his responsibilities (*id.* at ¶¶ 42-45), and strained relations generally with his colleagues (*id.* at ¶ 40).[3]

4. *The Abolition Of Fitzgerald's Job*

President Nixon's appointee as Secretary of the Air Force, Robert Seamans, Jr., took office on February 15, 1969. Seamans Dep. (R. 333-35) 1-122. According to Fitzgerald, Air Force retaliation against him continued under Secretary Seamans' leadership. R. 28 (Affidavit of A. Ernest Fitzgerald), ¶¶ 45-47, 50-59.

In May 1969, Assistant Secretary Thomas Nielsen, a holdover appointee and Fitzgerald's immediate superior,

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[3]The Civil Service Commission noted that friction had arisen between Fitzgerald and the Department of the Air Force, but attributed it to a cause other than retaliation. The CSC found that what Fitzgerald (and a front-page story in the *Washington Post*) had described as the revocation of his tenure had in fact been the *bona fide* correction of an administrative error and that Fitzgerald had never had any tenure which could be revoked. Air Force officials concluded that Fitzgerald had been "directly or indirectly responsible for" unfair and inaccurate press accounts of this incident and had planted the story "for the purpose of placing the Air Force in a bad light." (JA 74a, 82a).

proposed a reorganization that would have eliminated Fitzgerald's position. *See* Seamans Dep. (R. 333-35) 2-76 to -80. On May 9, Seamans called Petitioner Bryce Harlow, a member of the White House staff responsible for relations with Congress, seeking an assessment of what the reaction on the Hill would be to a reorganization that resulted in the abolition of Fitzgerald's job. *Id.* at 2-112, 2-114 to -115, 2-134, 3-55 to -56, 3-199 to -200. Harlow's executive assistant, Lamar Alexander, called back later and said that it would not be a good time to take such an action. *Id.* at 2-117, 2-120. Seamans decided not to implement Nielsen's plan. *Id.* at 3-234.

Some six months later, in the context of substantial Defense Department-wide reductions in defense spending and civilian employees, Nielsen's replacement, Spencer Schedler, proposed a reorganization of his office which included, among other things, the abolition of Fitzgerald's job. JA 159a.[4] On November 3, 1969, Secretary Seamans signed the order abolishing Fitzgerald's position effective January 5, 1970. JA 158a-59a. Seamans testified unequivocally that he was not directed or advised to take this action by then President Nixon or any person acting on his behalf. JA 159a-60a, 161a; *see* Laird Dep. (R. 455) 14-15. Seamans also denied that his decision had been motivated by Fitzgerald's C-5A testimony. JA 160a, 168a.

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[4]During the interim, Fitzgerald met with Secretary of Defense Melvin Laird to consider the possibility of placing Fitzgerald in a different job in the Defense Department. Laird Dep. (R. 455) 7-9, 10-11, 97-98. However, Laird's personal assessment was that Fitzgerald was not interested in a job in the Department of Defense. *Id.* at 10-11, 79-80.

5. *Opposition By Some Members Of The White House Staff To The Air Force Decision*

On November 4, Fitzgerald's termination was announced to the press, and it generated a wave of critical publicity. *See, e.g.*, PX 186, 187, 188 (to R. 378). As a result, one member of the White House staff, Clark Mollenhoff, telephoned Seamans and met with Schedler and his military aide to determine the basis for the Air Force's action. Seamans Dep. (R. 333-35) 3-14 to -15; Mollenhoff Dep. (R. 331) 79-86. Following these inquiries, Mollenhoff prepared a memorandum addressed to President Nixon which described the Fitzgerald matter as a public relations problem. JA 259a-60a.[5] Mollenhoff proposed, as one possible solution to the problem of press criticism, that the White House "arrange to move Mr. Fitzgerald to some other job in the Defense Department * * *." *Id.*

In early December 1969, Secretary Seamans became concerned that the White House was going to require Fitzgerald's reinstatement. JA 156a. Consequently, he told Mollenhoff by phone on December 5 that he was strongly opposed to White House interference with the reorganization and that any change in the reorganization would be "over [his] dead body." JA 156a. Seamans and Deputy Secretary of Defense David Packard also expressed this concern to Bryce Harlow. JA 157a-58a; 227a; *see* Harlow Dep. (R. 392) 116.

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[5]Discovery disclosed that this memorandum was routinely referred to another member of the White House staff for further comment, and did not reach President Nixon. Krogh Dep. (R. 468) 13. *See also* Harlow Dep. (R. 392) 177.

6. *President Nixon's December 8, 1969, Press Conference*

President Nixon became aware of the dispute within his Administration over the Fitzgerald matter when he reviewed a "briefing book" (of the sort routinely prepared prior to press conferences) containing conflicting proposals on how he should respond to anticipated questions regarding Fitzgerald at a press conference scheduled for December 8, 1969. JA 130a-31a. A "Q & A" drafted by White House Aide Patrick Buchanan on the basis of materials supplied by the Department of Defense (JA 266a; *see* JA 93a) recommended that the President deny that Fitzgerald had been terminated as a retaliatory step but indicate that Fitzgerald would be working "elsewhere" in the future. By contrast, a memorandum by Clark Mollenhoff (JA 270a-71a; *see* JA 96a-97a) and Buchanan's personal recommendation (JA 267a-69a; *see* JA 93a-95a) agreed that the public impression that Fitzgerald's termination had been retaliatory was erroneous, but advocated, from a public relations standpoint, reemploying Fitzgerald in the Defense Department in a different job. *See* JA 90a-92a.

At the press conference on December 8, President Nixon was asked a rambling question referring in part to the Fitzgerald matter. JA 228a. Conscious of the dispute between Defense Department officials and certain members of his staff who were advocating Fitzgerald's reinstatement (JA 130a-31a, 135a), the President responded by indicating that he would look into the matter. JA 228a.

7. *President Nixon's Efforts To Assist Fitzgerald*

The next day, in order to honor his promise at the press conference and to implement the substance of Mollenhoff's proposal while accommodating the Defense Department's opposition to Fitzgerald's reinstatement, President Nixon told H. R. Haldeman to do what he could to find Fitzgerald a position in the Bureau of the Budget. JA 275a, 289a, 109a-11a, 137a, 139a, 140a-41a. President Nixon later raised the matter himself in a personal meeting with the Bureau's Director, Robert Mayo. JA 141a, 125a-26a, 105a-06a. However, both Mayo and his deputy, James Schlesinger, resisted Fitzgerald's placement in their agency because of an absence of available upper-grade positions and their suspicion that Fitzgerald had passed information out-of-channels to a Congressional committee. JA 146a-48a, 126a. In the face of this opposition, President Nixon ceased his efforts to place Fitzgerald in the Bureau of the Budget. JA 106a, 276a-77a, 126a-27a.

In mid-January, President Nixon read an account in the White House news summary of a *Chicago Tribune* editorial critical of his Administration's handling of the Fitzgerald matter. JA 273a, 131a-32a. The President noted in the margin of this summary, "H [Haldeman]—I wonder if we fumbled this one—check it out again." *Id.* The President's request was referred by his staff to Henry Kissinger, who as the president's National Security Advisor was responsible for liaison with the Department of Defense. JA 233a-34a. Kissinger responded that no further action was necessary. JA 290a-91a; *see* R. 375, ¶ 2; R. 436, ¶ 2.

8. *Secretary Seamans' Invocation Of Executive Privilege And The President's 1973 Press Conference*

Following his termination, Fitzgerald initiated an administrative proceeding before the Civil Service Commission seeking reinstatement and backpay. On January 30, 1973, Secretary Seamans testified in that proceeding that he had "never received any instruction" from the White House regarding the Fitzgerald matter. R. 255, Attachment I, p. 494. However, he refused to answer further questions regarding his communications with members of the White House staff. *Id.* at 493-501.

At a Presidential press conference the next day, Clark Mollenhoff, who had returned to his career as a journalist, asked President Nixon a series of questions about the executive privilege issues arising from Seamans' action. JA 183a-85a. Mollenhoff's final question sought information on "the specific situation with regard to Fitzgerald." Mr. Nixon replied (*id.*):

> Let me explain. I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me.
>
> No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it.

After the press conference, President Nixon discussed the matter of executive privilege, an issue of then-current importance in light of the Ervin Committee hearings, in several recorded conversations with his aides. Nixon Pet. App. C, pp. 13a-21a. In the midst of a conversation

with John Ehrlichman, President Nixon realized that during his press conference he had confused Fitzgerald with another civilian in the Defense Department. *Id.* at 17a; JA 132a-34a. After confirming the error (Nixon Pet. App. C, p. 18a), President Nixon directed his press secretary to issue a correction (Nixon Dep. I (R. 378) 130-32, 267). The next day, Ron Ziegler stated to the press in pertinent part (JA 196a):[6]

> [The President] indicated to me after reading the transcript of yesterday's press conference that he was mistaken in his reference to Mr. Fitzgerald and the fact of the matter is that the President did not, as indicated yesterday in the press conference, have put before him the decision regarding Mr. Fitzgerald.

9. *The CSC Decision*

On September 18, 1973, the Civil Service Commission, ruling on Fitzgerald's appeal from the decision abolishing his job, found that he had not been the subject of retaliation for his Congressional testimony. JA 81a. However, the CSC also concluded that the abolition of Fitzgerald's job "resulted from reasons purely personal to" him and that this was improper because the statute governing reductions in force directs that they be implemented without regard to the individuals holding the affected positions. JA 86a-87a. The CSC directed that Fitzgerald be reinstated to his old job, or an equivalent position, with backpay. JA 87a-88a.

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[6]President Nixon's last contact with the Fitzgerald matter occurred in late February and March 1973 when he directed Ron Ziegler and John Dean to cooperate with Mollenhoff's efforts to settle Fitzgerald's then-pending Civil Service proceedings. Nixon Pet. App. C, p. 25a-32a; JA 225a-26a.

10. *Fitzgerald's Complaints In This Action*

Unsatisfied with reinstatement and backpay, Fitzgerald filed the original complaint in this action, seeking over $3,500,000 in compensatory and punitive damages from eight Air Force and Defense Department officials and Petitioner Alexander Butterfield. R. 1. However, the district court granted a motion to dismiss based on the District of Columbia's three-year statute of limitations. 384 F. Supp. 688 (1974). On appeal, the court of appeals affirmed as to all of the defendants from the Department of Defense, but reversed as to Butterfield, holding that Fitzgerald had no reason to know prior to 1973 of any activity by Butterfield. 553 F.2d 220 (1977).

Frustrated in his attempts to sue members of the Defense Department, Fitzgerald shifted his attack to the White House. Some eight and a half years after the abolition of his job, he filed a Second Amended Complaint and added former President Nixon as a defendant. R. 140. The Complaint alleged generally that Petitioners Nixon, Harlow, and Butterfield and various unnamed others had conspired for nearly a decade to punish Fitzgerald for his C-5A testimony.

On this basis, the Second Amended Complaint asserted eight causes of action, founded on constitutional provisions, several federal statutes, and the common law of the District of Columbia. *Id.* at ¶¶ 44-59. By the end of pretrial proceedings, three causes of action remained, based on the First Amendment and two federal statutes, 18 U.S.C. § 1505 and 5 U.S.C. § 7211. Respondent's Supplemental Brief (No. 79-1738) (filed May 14, 1980); *see* Nixon Pet. App. B, pp. 11a-12a. The Second Amended Complaint requested $3,500,000 "or more" in compensatory and punitive damages. R. 140, p. 21.

11. *Pretrial Proceedings*

Former President Nixon responded initially to the Second Amended Complaint with a motion to dismiss or, in the alternative, for summary judgment on the grounds, *inter alia*, of absolute immunity. *See* R. 163. By order filed on April 27, 1979, the district court deferred decision on the issue of absolute immunity and permitted deposition discovery to begin. JA 56a-57a.

Mr. Nixon, whose defense was then essentially being conducted by a single Department of Justice lawyer who also represented both co-defendants and government employee witnesses with potentially divergent interests, retained private counsel to represent him in subsequent proceedings in the district court. Following a year of extensive liability discovery, former President Nixon renewed his motion for summary judgment based on absolute Presidential immunity. R. 445, 447 (p. 17 n.13). Numerous other grounds for total and partial summary judgment were also advanced. R. 445-46, 448-49.

12. *The Decision Of The District Court*

In a March 11, 1980, order, the district court denied the motion for summary judgment based on absolute immunity, stating (Nixon Pet. App. A, p. 2a):

> Absolute immunity is not available either to defendant Nixon as a former President or to defendants Harlow and Butterfield. *Butz v. Economou*, 438 U.S. 478 (1978); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3467 (Dec. 7, 1979).

The court also held that "genuine issues of fact" precluded summary judgment on the issues of qualified immunity and the statute of limitations and reaffirmed

its prior rulings that Fitzgerald could assert rights of action under the First Amendment, 5 U.S.C. § 7211, 18 U.S.C. § 1505, and District of Columbia common law. *Id.* at 1a-10a.

13. *Proceedings In The Court Of Appeals*

On April 11, 1980, former President Nixon filed a notice of appeal from the denial of absolute immunity. R. 518. Fitzgerald moved to dismiss for lack of jurisdiction, or, in the alternative, for summary affirmance. On April 30, 1980, in a brief *per curiam* order, the court of appeals granted the motion to dismiss. Nixon Pet. App. D, pp. 35a-36a.[7]

SUMMARY OF ARGUMENT

The district court's order denying former President Nixon's motion for summary judgment based on absolute Presidential immunity is an immediately appealable "collateral order." That ruling conclusively determined the question of absolute immunity, an issue completely separate from the merits of this action and effectively unreviewable upon an appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Abney v. United States*, 431 U.S. 651, 658-59 (1977); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979). Accordingly, the merits of absolute Presidential immunity are properly before this Court.

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[7]After Mr. Nixon's Petition and the Brief in Opposition had been filed in this Court, an agreement was concluded setting maximum and minimum limits for potential liability in the case. Appendix to Respondent's Opposition to Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief (filed August 24, 1981). A full discussion of this agreement is contained in Petitioner Nixon's Response to Halperins' Motion to Intervene and for Other Relief (filed August 24, 1981).

Prior decisions of this Court have extended absolute immunity to various categories of public officials, including state and federal judges, *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), prosecutors, *Imbler v. Pachtman*, 424 U.S. 409 (1976), state legislators, *Tenney v. Brandhove*, 341 U.S. 367 (1951), and some administrative officials, *Butz v. Economou*, 438 U.S. 478, 508-17 (1978). In the context of each such category of officials, the Court has undertaken a considered inquiry into (1) "the immunity historically accorded the relevant official at common law" and (2) "the interests behind it." *Butz v. Economou, supra*, 438 U.S. at 508. These criteria compel recognition of absolute immunity for Presidents of the United States acting in their official capacity.

Absolute immunity from civil damage liability has been "historically accorded" the President. During extensive original debates on the powers of and restraints on the Presidency, no one suggested that Presidents were to be accountable in civil damages for their official actions. Rather, the Framers chose to restrain the President through a combination of political checks and balances, public accountability, and, in extreme cases, impeachment. *The Federalist* No. 77 (Alexander Hamilton) at 564 (Franklin Library ed. 1980). Early commentators recognized the President's immunity from civil liability. III J. Story, *Commentaries on the Constitution of the United States*, § 1563, at 418-19 (1833 ed.); W. Maclay, *Sketches of Debate in the First Senate of the United States*, 151-52 (Harris ed. 1880).

The virtual absence of suits against Presidents for nearly two hundred years is equally compelling proof of the immunity from civil damage liability "historically accorded" those officials. The court of appeals' decision in *Halperin v. Kissinger*, 606 F.2d 1192, 1210-13 (D.C.

Cir. 1979), *aff'd by an equally divided Court*, No. 79-880 (June 22, 1981), which held that Presidents are entitled only to a qualified "good faith" immunity, represents a sharp departure from a well-established historical understanding.

The "interests behind" absolute Presidential immunity fully justify its continued recognition. As in the case of legislative, judicial, and prosecutorial officials who have been granted absolute immunity, the President must be given this protection to safeguard the public's interest in the "vigorous and fearless performance" of Presidential duties. *Imbler v. Pachtman, supra*, 424 U.S. at 427. *See, e.g., Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950). Moreover, in the case of the President, the historic policy grounds for absolute immunity are given additional force by the principle of separation of powers.

Examining the justification for absolute Presidential immunity in more detail, the President's duties and responsibilities are unique from both Constitutional and practical standpoints. The President is vested with the "executive Power," is responsible for the nation's relationships with foreign states, and performs a host of functions whose importance has grown with this nation's economic and social integration and its emergence as a world power. The public's interest in the "vigorous and fearless" performance of these duties is very weighty.

At the same time, the President's visibility makes him particularly susceptible to suit by persons who perceive themselves as his victims and by others with political motives. The threat of such suits would have the same negative influence on Presidents that it is properly perceived to have on other officials entitled to absolute immunity. Such suits would impose unrecoupable costs of litigation on Presidents, in terms of both time and

money. Time spent by a President in office on the defense of civil actions would be diverted from public business. Intrusive discovery now customary in civil actions, *see Herbert v. Lando*, 441 U.S. 153, 176 & n.26 (1979), would have a particularly severe impact on the President and his high-level advisors, whose involvement in any suit against a President would be unavoidable. Finally, the threat of adverse judgments arising out of Presidential decisions would be the same deterrent to the "vigorous and fearless" performance of Presidential duties that it is in the case of other officials.

Civil damage liability is not necessary to compensate the occasional plaintiff with a meritorious claim against a President or to deter unlawful conduct. An array of administrative and Federal Tort Claims Act remedies is potentially available to plaintiffs injured by government action for which the President is responsible. Checks and balances, accountability to the electorate, public opinion, and the possibility of impeachment were the means chosen by the Framers to restrain the President, and they remain fully sufficient for that function today.

Qualified, "good faith," immunity (*e.g., Wood v. Strickland*, 420 U.S. 308, 322 (1975)), is not an adequate safeguard of the public interest underlying Presidential immunity. It provides no protection at the pleading stage, entails unlimited discovery into the merits of allegations against a President and his thought processes, and offers no realistic prospect of a disposition short of trial. *See Doe v. McMillan*, 412 U.S. 306, 339 (1973) (Rehnquist, J., concurring and dissenting); *Tenney v. Brandhove, supra*, 341 U.S. at 377.

Absolute Presidential immunity is also justified by the Constitutional principle of separation of powers. If Presidents are denied absolute immunity, their motives and thought processes will routinely be subject to judicial

inquiry and oversight and the Constitutional privilege for their communications with advisors will be undermined. *See United States v. Nixon*, 418 U.S. 683 (1974). In the analogous context of the Speech or Debate Clause, this Court has recognized the threat posed by such judicial action on the integrity of the coequal branches of government. *United States v. Johnson*, 383 U.S. 169, 178-79 (1966). The same concern justifies absolute Presidential immunity from civil damage liability. Absent a clear mandate, the judiciary should not jeopardize the integrity of the Executive and abrogate the historical immunity of the President.

ARGUMENT

I.

THE DISTRICT COURT'S RULING ON FORMER PRESIDENT NIXON'S ABSOLUTE IMMUNITY DEFENSE WAS AN APPEALABLE "FINAL DECISION"

This Court's cases establish that, under 28 U.S.C. § 1291 (*see* p. 3, *supra*), a small class of "collateral orders" issued by district courts are immediately appealable to the courts of appeals. To fall within this category, an order must

> conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). *Accord, Abney v. United States*, 431 U.S. 651, 658 (1977); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979). The district court's order denying former President Nixon's motion for summary judgment on the ground of absolute immunity clearly meets each of these three criteria:

First, the district court's rejection of absolute Presidential immunity was by its terms final, unqualified and thus "conclusive" for purposes of the collateral order doctrine (Nixon Pet. App. A, p. 2a):

> Absolute immunity is not available either to defendant Nixon as a former President or to defendants Harlow and Butterfield.

See Helstoski v. Meanor, supra, 442 U.S. at 506; *Abney v. United States, supra,* 431 U.S. at 659.

Second, the issue of absolute Presidential immunity in this case is both "important," because it implicates the relationship between two Branches of the federal government and the public's interest in vigorous Presidential leadership (*see* pp. 44-48, *infra*) and "completely separate from the merits of the action." Former President Nixon's absolute immunity defense can be determined here without regard to the merits of Fitzgerald's claim. *See Abney v. United States, supra,* 431 U.S. at 659-60; *Helstoski v. Meanor, supra,* 442 U.S. at 506-08. Indeed, the defense of absolute immunity could not serve its purpose if its determination depended on the merits of the claim to which it is interposed. *See* pp. 48-49, *infra.*

Third, absolute immunity, like the defense of double jeopardy or the protection conferred by the Speech or Debate Clause, is designed to "protect [its beneficiaries] 'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Helstoski v. Meanor, supra,* 442 U.S. at 508, *quoting Dombrowski v. Eastland,* 387 U.S. 82, 85 (1967). *See Abney v. United States, supra,* 431 U.S. at 660-61; *Forsyth v. Kleindienst,* 599 F.2d 1203, 1207 (3d Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth,* 49 U.S.L.W. 3969 (U.S. June 29, 1981) (No. 79-1120). Because such rights are vindicated only if given effect at the threshold of litigation, delayed review is "ineffective."

The court of appeals gave no reason whatever for its refusal to review the district court's denial of former President Nixon's absolute immunity defense. Its ruling cannot be squared with this Court's decisions in *Abney* and *Helstoski*, which held that orders indistinguishable in any material sense from that of the district court here were immediately appealable. The court of appeals' ruling is also at odds with the decision of the only other court of appeals to have considered the same issue. *Forsyth v. Kleindienst, supra.*[8]

Fitzgerald's claim in his Brief in Opposition (p. 2) that this case was not, within the meaning of 28 U.S.C. § 1254, "in" the court of appeals at the time Mr. Nixon's Petition was filed "because that court had granted respondent's motion to dismiss for lack of jurisdiction" is meritless. Acceptance of that unprecedented proposition would effectively insulate any ruling by a court of appeals denying the existence of appellate jurisdiction from all review by this Court. This Court has routinely reviewed such rulings. *E.g., Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

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[8]Indeed, the court of appeals' order is in apparent conflict even with its own decisions in *McSurely v. McClellan*, 521 F.2d 1024, 1030-33 (D.C. Cir. 1975), *aff'd in pertinent part en banc*, 553 F.2d 1277, 1283-84 n.18 (D.C. Cir. 1976), *cert. dismissed*, 438 U.S. 189 (1978); *Briggs v. Goodwin*, 569 F.2d 10, 59-60 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978); and *Dellums v. Powell*, No. 80-1331 (D.C. Cir. July 24, 1981), slip op. at 4 & n.5.

The only assertion advanced by Fitzgerald in support of his motion to dismiss the appeal for lack of appellate jurisdiction was that the former President's absolute immunity defense was not "serious and unsettled" in light of *Halperin v. Kissinger, supra*, 606 F.2d 1192. This claim never had merit. But, in any event, the recent affirmance of *Halperin* by an equally divided Court and the grant of the writ in this case establish the serious and unsettled nature of Mr. Nixon's contentions.

II.

THE PRESIDENT HAS HISTORICALLY BEEN RECOGNIZED AS IMMUNE FROM CIVIL LIABILITY

This Court's prior decisions have extended absolute immunity to various categories of public officials, including judges, *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); *Pierson v. Ray*, 386 U.S. 547 (1967), prosecutors, *Imbler v. Pachtman*, 424 U.S. 409 (1976), state legislators, *Tenney v. Brandhove*, 341 U.S. 367 (1951), and some lower level executive officials, *Butz v. Economou*, 438 U.S. 478, 508-17 (1978). In *Butz*, the Court described the two sources to which it has referred in determining the recurrent issue of absolute immunity (438 U.S. at 508):

> In each case, we have undertaken "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." [*quoting Imbler v. Pachtman, supra*, 424 U.S. at 421].

The nature of the immunity "historically accorded" the President is clear. When the office itself was being created and the Constitution ratified, the question of how to restrain the Chief Executive was given close consideration. It was never suggested that civil damage actions would be an appropriate restraint, and contemporaneous authorities expressed the understanding that the President was immune from suit. This understanding was so widely shared that, for nearly two hundred years, civil damage actions against Presidents arising out of their actions in office were exceedingly rare. This is surely an issue on which "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

A. The Original Understanding

The powers of and limitations on the Presidency were among the most important and controversial questions debated during the Constitutional Convention and the process of ratification.[9] After the authority of the King of England and the colonial governors was broken, the understandable reaction on the State and national level was to vest nearly total authority in the legislative branch. In the immediate post-revolutionary period, the systems of government of virtually every state and the Confederation took this form. C. Thach, *The Creation of the Presidency 1775-1789*, chs. 2-3 (1969 ed.). By 1787, however, the concept of sole control by the legislature had been discredited. Ineffective administration and legislative excesses generated pressure at the Constitutional Convention for a strong Executive independent of the Congress. *See id.* at 52, 74, 169.

At the same time, the delegates to the Convention were all too aware, from the recent colonial experience, of the dangers associated with uncontrolled executive authority. They were unwilling to trust the self-restraint of the President, and created a system vesting substantial power in the Presidency while at the same time subjecting the office to substantial restraints. All authorities support the conclusion that political checks and balances, public accountability, and, in extreme cases, impeachment were the exclusive means chosen to achieve this

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[9]The heat of the debate over this issue was reflected in Alexander Hamilton's complaint concerning criticism of the office of the Presidency (*The Federalist* No. 67 at 491 (Franklin Library ed. 1980)):

> There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this; and there is perhaps none, which has been inveighed against with less candor or criticized with less judgment.

goal. In the last of his essays on the Presidency, for instance, Hamilton summarized this Constitutional plan as follows (*The Federalist* No. 77 at 564 (Franklin Library ed. 1980)):

> The remaining enquiry is: does it [the Presidency] combine the requisites to safety in the republican sense—a due dependence on the people—a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances, the election of the president once in four years by persons immediately chosen by the people for that purpose; and from his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other; and to the forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones, which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the chief magistrate of the United States would by that plan be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people?[10]

These were the means chosen to limit the recognized possibility of Presidential abuses. James Madison had urged that "some provision should be made for defending the Community against the incapacity, negligence, or perfidy of the chief Magistrate." II M. Farrand, *The Records of the Federal Convention of 1787*, 65 (1927

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[10]Essentially the same views were frequently expressed by James Wilson, later a Justice of this Court, whom at least one commentator (C. Thach, *supra*) has credited with the design of the Presidency. I *The Works of James Wilson*, 400 (Andrews ed. 1896); II *id.* at 45; II J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 479-80 (1836).

ed.). There had also been agreement that the President should not be "above Justice" (*id.* at 65 (remarks of George Mason)), and that the Constitution should not reflect the principle "that the chief Magistrate could do [no] wrong" (*id.* at 66 (remarks of Eldridge Gerry)). Nevertheless, primary reliance was placed on the political process. For example, Rufus King argued that the President "would periodically be tried for his behavior by his electors, who would continue or discontinue him in trust according to the manner in which he discharged it." *Id.* at 67; *see id.* at 68. No one suggested that a President would be routinely subject to civil damage liability in state and federal courts for his actions in office.

The understanding that the President would be restrained by structural checks, accountability, and impeachments, but not by civil damage liability, was clear to contemporaneous commentators. Justice Story concluded (III J. Story, *Commentaries on the Constitution of the United States*, § 1563, at 418-19 (1833 ed.)):

> There are * * * incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and is accountable only to his country, and to his own conscience. His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive.

Vice President John Adams and Senator Oliver Ellsworth of Connecticut (a member of the Constitutional Convention and later a Chief Justice of this Court) also concluded that no action could be instituted personally against the President, since that power would permit a single judge to "stop the whole machine of government." They added "[Y]ou could only impeach [the President], and no other process whatever lay against him." W. Maclay, *Sketches of Debate in the First Senate of the United States*, 151, 152 (Harris ed. 1880).

B. The Absence Of Civil Suits Against The President

Potential suitors drew one conclusion from these early authorities. For nearly two hundred years there were virtually no reported civil damage actions against a President.[11] This dearth of suits must be viewed as substantial evidence of the absolute immunity "historically accorded" the President. Indeed, when this Court had before it the question whether a President could be sued to restrain enforcement of an allegedly unconstitutional statute, heavy reliance was placed on the absence of any attempt in the prior eighty-five years to file such an action (*Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500 (1875)):

> The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.[12]

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[11] Our research has revealed only one case prior to the 1970's in which a party sought civil damages from a President for his actions in office. *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8, 411) (1811). This suit, which sought damages for an alleged trespass committed by a marshal acting at President Jefferson's orders, was dismissed for want of jurisdiction.

[12] The Court also stated (*id.*):

> It was admitted on the argument that the application now

[footnote continued]

The scarcity of civil damage actions against Presidents for a much longer period is still more indicative of "the general judgment of the profession that no such application should be entertained." This "general judgment" was, moreover, shared by members of this Court. For instance, in *Barr v. Matteo*, 360 U.S. 564, 583 (1959) (Warren, C.J., dissenting), former Chief Justice Warren (joined by former Justice Douglas) explained that the absolute immunity recognized in *Spalding v. Vilas*, 161 U.S. 483 (1896), "partakes of presidential immunity." *Cf. Doe v. McMillan*, 412 U.S. 306, 319 (1973) ("executive officers with discretionary functions * * * have been held absolutely immune regardless of their motive or good faith"). Finally, when a wave of civil damage actions was filed against President Nixon during a highly-volatile period of our history in which litigation was increasingly viewed as a means for resolving political disputes, the lower courts initially dismissed them on grounds of absolute immunity. *Reese v. Nixon*, 347 F. Supp. 314, 316-17 (C.D. Cal. 1972), *aff'd in pertinent part*, No. 72-3070 (9th Cir. May 3, 1974); *Bohmer v. Nixon*, Civ. No. 75-4-T (S.D. Cal. June 21, 1976); *Davis v. Nixon*, Civ. No. 73-1520-LTL(G) (C.D. Cal. June 18, 1974); *Fonda v. Nixon*, Civ. No. 73-2442-MML (C.D. Cal. May 23, 1974). (These unpublished opinions are reprinted in the Joint Appendix, pp. 302a-332a.

The decision of the D.C. Circuit in *Halperin v. Kissinger* thus represents a sharp break from an understanding held with apparent unanimity since the first days of the Republic. There had, of course, been many, many heated disputes over a President's authority and conduct in office. But, before *Halperin*, those suits were either kept out of the courts or were pursued in the courts in

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made to us is without a precedent; and this is of much weight against it.

the names of other parties. *E.g., Myers v. United States,* 272 U.S. 52 (1926); *Humphrey's Executor v. United States,* 295 U.S. 602 (1935); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

If the holding in *Halperin* becomes the law, such disputes and many others far more trivial will routinely be brought to state or federal court with a count seeking compensatory and punitive civil damages from the President in his personal capacity. *See National Treasury Employees Union v. Reagan,* No. 80-1294 (D.C. Cir. August 11, 1981). Indeed, the experience with equitable suits against Presidents is an indication of the likely consequences. The court of appeals' decision authorizing mandamus actions against a President in *National Treasury Employees Union v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974), has spawned a number of such suits, *see e.g., Dickson v. Ford,* 521 F.2d 234 (5th Cir. 1975), *cert. denied,* 424 U.S. 954 (1976); *Mapco, Inc. v. Carter,* 573 F.2d 1268 (Temp. Em. Ct. App. 1978), *cert. denied,* 437 U.S. 904 (1978); *Daughtrey v. Carter,* 584 F.2d 1050 (D.C. Cir. 1978). The President has also been named as a defendant in a wave of suits brought by Congressmen. *Dole v. Carter,* 569 F.2d 1109 (10th Cir. 1977); *Edwards v. Carter,* 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied,* 436 U.S. 907 (1978); *Goldwater v. Carter,* 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated mem.,* 444 U.S. 996 (1979). There is no reason to believe that damage actions against a President, if approved by the Court, would follow a different course.

III.

ABSOLUTE PRESIDENTIAL IMMUNITY IS "ESSENTIAL FOR THE CONDUCT OF THE PUBLIC BUSINESS"

The second element of the analysis described in *Butz v. Economou, supra,* is an inquiry into "the interests behind" the immunity accorded an official. The classic

rationale for extending absolute immunity to an official has long been that this protection is necessary to vindicate the public's interest in effective government. Exposure to civil damage suits is properly understood to undermine that interest, both because the threat of ultimate liability would "prevent the vigorous and fearless performance" of the official's duties, *e.g.*, *Imbler v. Pachtman, supra,* 424 U.S. at 427, and because the litigation of civil damage claims diverts the official's energy and attention from the public business.

This rationale applies with particular force to the Presidency, is buttressed by the principle of separation of powers, and fully justifies the absolute immunity that has been historically extended to the holders of that office. Because the President's responsibilities are immense and national in scope, the public's interest in the "fearless" performance of his duties is unparalleled. At the same time, the President's visibility poses a special threat to that interest; the office is a likely focus of dissatisfaction, readily transformed into litigation, on the part of persons who perceive themselves as victims of the many difficult choices that a President and his Administration must make daily. Requiring a President in office to respond to civil damage suits in the interest of vindicating rare meritorious claims will divert the Chief Executive's attention from urgent public business. Moreover, even if suits could be postponed until after Presidents have left office, an alternative that would prejudice them, immunity would still be justified as a means of assuring that Presidents will not function under a constant threat, resulting from both the costs of litigation and the possibility of ultimate liability, aimed at their personal estates. A dependable, threshold defense is necessary to safeguard the public's interest in the performance of Presidential duties, and qualified immunity cannot perform this function in the context of the Presidency.

A. The Public's Interest In The "Vigorous And Fearless" Performance Of Presidential Duties

From both a theoretical and a practical perspective, the Presidency is unique in its authority and responsibilities. Alone among all officials in the Executive Branch, the President derives authority directly from the Constitution; only that office is vested with the "executive Power," U.S. Const., Art. II, § 1. In the area of international relations, moreover, the President exercises "the very delicate, plenary and exclusive power * * * as the sole organ of the federal government." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), *quoted with approval in Dames & Moore v. Regan*, 49 U.S.L.W. 4969, 4971 (U.S. June 24, 1981) (No. 80-2078). The Constitution also confers a number of important enumerated powers on the President. He is "Commander in Chief" of the armed forces and has the power to grant pardons, "to make Treaties" with the advice and consent of the Senate, to appoint ambassadors, Judges and various "Officers of the United States," U.S. Const., Art. II, § 2, and to veto legislation, *id.*, Art. I, § 7.

The Constitution's drafters intended, by conferring these powers, to create a strong Executive. *See generally* C. Thach, *The Creation of the Presidency 1775-1789*, chs. 1-4 (1923). The Presidency has assumed even greater importance in modern times. Through legislation, Congress has delegated a host of functions to the President, or to officials in agencies functioning under his supervision and control. As a result, the President now directs an enormous federal bureaucracy that fundamentally affects every citizen. The importance of the President's oversight of the defense establishment and his decisions as Commander-in-Chief has also grown enormously as this country has attained the status—and

responsibilities—of a world power. Since at least the Great Depression, he has also been held responsible by the public for the oversight of the national economy. And, because of his position as a nationally-elected official, the President is also expected to play a role in the formulation of legislation and to counteract the divergence of the points of view held by individual members of Congress.

The importance of the President's functions makes the public's interest in the "vigorous and fearless performance" of those duties all the more weighty. It does not downplay the significance (individually or collectively) of judges, prosecutors, and legislators in this country to suggest that if civil damage liability has the same negative effect on Presidents that it is universally understood to have on these other officials, the consequences for the public of exposing Presidents to civil suits will be extraordinarily severe. The magnitude of the public's interest is the critical "interest behind" absolute Presidential immunity. *Gregoire v. Biddle,* 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.), *cert. denied,* 339 U.S. 949 (1950).

B. The President's Susceptibility To Civil Suit

The very importance of the Presidency also magnifies the threat posed by civil suits to the public's interest in the performance of responsibilities entrusted to the office. Like prosecutors and judges, Presidents excite strong feelings in a large number of persons who perceive themselves as the victims of Presidential decisions. *Imbler v. Pachtman, supra,* 424 U.S. at 425 (suits against prosecutors "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate"); *see Bradley v. Fisher, supra,* 80 U.S. (13 Wall.) at 348. Each of these individuals is a potential plaintiff.

The President's position at the head of the government makes him uniquely visible. As President Truman's famous aphorism, "the buck stops here," suggests, it is the President's function to decide personally the most difficult, controversial, and important issues facing any Administration. Decisions on such matters are the most likely to "arouse the most intense feelings." *Pierson v. Ray, supra,* 386 U.S. at 554. On the other end of the spectrum, any modern President comes into tangential contact with literally thousands of minor matters that reach his desk precisely because they have become controversial. The issue of Fitzgerald's employment, which Mr. Nixon encountered in the context of two press conferences, is a prime example.

The President is also particularly vulnerable to politically-motivated lawsuits. A President's election to office can be viewed as a mandate for significant changes in policy. In such instances, the President will be both the prime mover of those changes and their visible symbol. It is naive to suggest that political opponents will not resort to the courts, perhaps for motives that they consider valid, in an attempt to thwart the President personally or the policies he represents. As an experienced district judge (who sat as the trial court judge in this case) observed, "[M]any of these cases are political in character [and] involve highly controversial acts." *Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J., concurring).[13] Nor will all such suits be well-intentioned. It is likely that claims seeking damages directly from a President will also be motivated by a

[13]The suits brought against former President Nixon have included *Bohmer v. Nixon,* No. 75-4-T (S.D. Cal. June 21, 1976) (suit by "self-styled critics of the American form of government, and of the Nixon Administration"); *Fonda v. Nixon,* Civil No. 73-2442-MML (C.D. Cal. May 23, 1974) (suit with "obvious political overtones"); and *People Versus PORN (Profit of Richard Nixon) v. Nixon,* No. 80-1720, *cert. denied,* 49 U.S.L.W. 3911 (U.S. June 9, 1981).

desire for publicity, the wish to obtain discovery of Presidential documents, and the goal of harassment.

Recent decisions have lowered other obstacles to litigation. As this case illustrates, it is now easy for any reasonably-imaginative counsel to plead an implied right of action, based on a federal statute or Constitutional provision, that will survive a motion to dismiss. *See Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980).[14] Suits against the President, if allowed, will be responsive to the same factors responsible for the recent explosion in suits against government officials. *See Butz v. Economou, supra*, 438 U.S. at 526 (Rehnquist, dissenting); Director of the Administrative Office of the United States Courts, *Annual Report*, Table 28 (1980).

The relative scarcity of civil damage actions against Presidents to date is not evidence that the President is safe from improperly-motivated or nonmeritorious claims. That circumstance is attributable to the historical understanding, only recently questioned, that the President is absolutely immune. *See* pp. 23-26, *supra*. There is no reason to believe that he will be exempt from the general plaintiff's practice of suing all conceivable defendants and relying on discovery to narrow the field (if in fact the field is ever narrowed).[15]

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[14]The decision of the district court, which for the first time approved implied rights of action under 18 U.S.C. § 1505 and 5 U.S.C. § 7211, epitomizes the continuing willingness of lower courts to award civil damages on the basis of a variety of statutes, notwithstanding this Court's recent decisions in such cases as *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). Ordinarily, when a district court issues such a ruling, review must await a final judgment.

[15]The *Halperin* court drew the wrong conclusion from its observation that "suits that may be *successfully* pursued against a

[footnote continued]

C. The Burdens Of Modern Litigation

The immediate and unavoidable consequence of any suit in which the complaint surmounts relaxed standards applicable to allegations in a pleading is to require a President to participate in his own defense. The very process of responding to suits seeking civil damages imposes substantial costs on a present or former President, in terms of both time and money. Moreover, if a suit is filed against a President in office, it diverts the Chief Executive's attention from the public business. Such suits would "consume time and energies which would otherwise be devoted to governmental service." *Barr v. Matteo, supra,* 360 U.S. at 571 (plurality opinion); *see Imbler v. Pachtman, supra,* 424 U.S. at 425. The public's interest in the undivided attention of the Chief Executive compels recognition of a defense, absolute immunity, that allows him to perform his duties without interruption and without fear of immediate or postponed involvement in time-consuming and expensive litigation.

It is wishful thinking to believe that suits against Presidents can be handled for them without their direct participation. Absent absolute immunity, central issues in a suit against a President are sure to include the extent of his participation in the events from which the suit arose, the degree of his knowledge of surrounding circumstances, and his intentions. The only direct source for this information, to which any reasonably diligent attorney must seek access in the first instance, is the President himself. At a bare minimum, the President would have to be interviewed in detail at the outset and as often thereafter as is necessary as facts or allegations emerge. A President is also entitled, like any other litigant with his personal financial position at stake, to

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President will be quite rare." 606 F.2d at 1212 (emphasis added). The small percentage of successful suits weighs in favor of absolute immunity, which would protect the President from the inhibiting effect and burden of the great majority.

confer with his counsel on developments in a suit and to make informed decisions on the overall conduct of his defense. Discovery may also take up still more of his time. If the suit finds the President still in office, time spent on these unavoidable tasks will reduce the total available for public business. Presidents in office cannot be expected to put off dealing with suits filed against them and thereby accept the disadvantages that necessarily accompany delay, such as fading memories and mounting expenses.

The financial impact on a present or former President of responding to suits is also substantial. This Court may take judicial notice of the burgeoning costs of litigation. The primary element of these expenses is attorneys fees. Legal bills running into the hundreds of thousands of dollars for complex cases are not at all unusual. A President is not necessarily able to rely on free representation and will have to act accordingly.[16] This burden, with which a President will be saddled regardless of the outcome of a suit, creates tremendous pressure for nuisance value settlements which nonetheless have a

[16]The Justice Department has undertaken representation of many government officials as a matter of policy. *See* 28 C.F.R. § 50.15. However, this regulation furnishes Presidents with uncertain protection against the massive costs of counsel. Fitzgerald himself has challenged the regulation on the grounds that it is in excess of authority conferred by statute (R. 237), and others can be expected to continue the attack as a means of increasing their leverage. By its terms, the regulation is only permissive; it thus provides no guarantee of representation. Most important, the President may justifiably be concerned about Department of Justice representation. Where a plaintiff has joined the President with other officials as defendants, their defenses may well conflict, and the President may desire or require separate representation. Justice Department counsel must respect policy decisions by political appointees, perhaps members of an opposing political party, that may affect management of a President's case. And, like any other litigant with his personal estate at stake, a President may wish to choose an attorney, rather than accept the Department's designated lawyer.

substantial impact on his personal finances. Finally, to the costs of counsel are added the many substantial and necessary out-of-pocket expenses that a President may incur—travel, expenses for counsel, transcripts, fees to bring witnesses to court, fees for experts, and many others.

An aspect of civil suits that is particularly burdensome is discovery. This Court has recently noted (*Herbert v. Lando, supra,* 441 U.S. at 176 (1979) (footnote omitted)):

> [M]ushrooming litigation costs, much of it due to pretrial discovery, are not peculiar to the libel and slander area. There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus.

See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740-41 (1975); *ACF Industries, Inc. v. EEOC,* 439 U.S. 1081 (1979) (dissent from denial of certiorari).

This case furnishes an indication of just how burdensome discovery can be. The size of the record in this case (*see* JA 1a-53a) largely reflects the demands of discovery in a case in which the President was at one point alleged to be legally liable, under a conspiracy theory, for the actions of seventeen people in several Administrations over a period of ten years. *See* R. 140, 471 (Opposition), pp. 8 & n.9, 10. Mr. Nixon was deposed twice for a total of three days, and other deponents in this suit, which arose out of the termination of one middle-level Defense Department employee, included Melvin Laird, Henry Kissinger, Alexander Haig, and James Schlesinger, among many other government officials. Discovery ranged as far afield as the questions whether Alexander Butterfield was a CIA agent (Haldeman Dep. I (R. 418) 187-96), and whether a low-level White House aide participated in the decision to replace Robert Dole as Chairman of the Republican National Committee (Higby Dep. 56-63).

Absent a defense that can be reliably established on the pleadings, the full burden of modern discovery will fall squarely on Presidents sued for civil damages. In material terms, this burden includes time lost in responding to discovery and in being deposed, and the cost of counsel. It also entails the gratuitous loss of privacy inherent in examination regarding "credibility" and disclosure of financial data in the context of a request for punitive damages. Discovery will also necessarily divert high-level White House officials, who even if not named as co-defendants will be inevitable targets of discovery, and threaten the confidentiality of Presidential decision-making. As is discussed in more detail below (pp. 44-48, *infra*), these aspects of discovery threaten not only the President's personal interests but the integrity of the office. The concerns voiced in a separate opinion in *Halperin v. Kissinger* are thus amply justified (606 F.2d at 1214 (Gesell, J., concurring)):

> Each such suit [against high government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-ranging, time-consuming, and not without considerable cost to officials involved.[17]

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[17]It is frequently suggested that burdensome discovery may be curbed by the supervision of alert district court judges or by protective orders staying burdensome aspects of the litigation, such as discovery, until after a President has left office. However, such suggestions do not solve the problem. The discretionary decisions of hundreds of overworked district judges do not furnish the certainty needed to foreclose the anxiety created by civil damages exposure. Moreover, their discretion must be exercised in accordance with Rules of Civil Procedure that create an explicit

[footnote continued]

In short, the inhibiting effect of civil suits on a President's "vigorous and fearless performance" of his duties, *Imbler v. Pachtman*, 424 U.S. at 427, is not the result solely of the understandable concern as to the "inevitable danger" of an adverse outcome, *Gregoire v. Biddle, supra*, 177 F.2d at 581. It is also the result of many unavoidable costs of participating in a lawsuit.

D. The Inhibiting Effect Of Potential Liability

The classic rationale for absolute immunity has also focused on the negative influence that exposure to civil damage liability has on responsible decisionmaking. That rationale is as applicable here as in the context of any other official. Presidents share the same personal aspirations, responsibilities, and concerns that make the prospect of civil liability threatening to judges, prosecutors and legislators—among them, the needs of a family, the hope of a secure life after retirement, and the threat of catastrophic illness. If exposure to civil liability is understood as a threat to the public's interest in "fearless" action by these officials, it should not be

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presumption in favor of unlimited discovery. *See* Rule 26(b)(1), F.R.Civ.P. ("Parties may obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action."). Lastly, because only judicial refusals to permit discovery are likely to create any possibility of reversal, the targets of discovery have few practical means of obtaining appellate review and district judges have an incentive to err on the side of overbroad discovery.

The suggestion that delay in the filing of an action or a stay until the President has left office provides sufficient protection is equally shortsighted. For one thing, such a step only postpones the expense of litigation. Moreover, the passage of time, which inevitably results in dimmed memories and the loss of evidence, works against a defendant. The record of this case is replete with examples of attempts by Fitzgerald to capitalize on lost memory. *See* R. 446, pp. 18-20. Indeed, former President Nixon was deposed on a second occasion in this case because he had forgotten some of his efforts some eight years earlier on Fitzgerald's behalf. Only when documents reflecting these efforts surfaced at a late stage of discovery was Mr. Nixon's recollection refreshed.

viewed differently in the case of Presidents. *Cf. Tenney v. Brandhove,* 341 U.S. 367, 377 (1951) ("One must not expect uncommon courage even in legislators.").

In fact, for at least two reasons, a President may justifiably be more concerned than the average litigant about the possibility of an adverse judgment. The first is that a President arrives in any courtroom as a well-known (and perhaps for some, a notorious) figure. The very visibility that makes him a likely target for a suit also jeopardizes the objectivity of a jury. The second reason for increased concern is the fact that the scale of priorities and perspective of a President may be difficult, if not impossible, to convey to a lay jury. *See Imbler v. Pachtman,* 424 U.S. at 425 (suits against prosecutors will involve "the resolution of some technical issues by the lay jury"). For instance, in this case, the parties and the Court estimated that a month's trial would be necessary on a matter that consumed perhaps a half hour of former President Nixon's time over the course of four years. With that degree of immersion in the details of the matter, could the jury have been expected to comprehend the context, in terms of competing demands on Presidential time and attention, in which Fitzgerald's problem reached Mr. Nixon, particularly since Mr. Nixon might well have been unable to testify regarding other privileged matters then before him?

E. The Interests Of Potential Plaintiffs

Absolute immunity unquestionably entails subordinating the interests of rare plaintiffs who would otherwise be entitled to recover on a claim against a President. This sacrifice has been justified in the case of other officials, knowingly and willingly, on the ground that it is impossible to weed out meritorious claims without incurring the greater costs to the public interest that are inherent in exposing those officials to civil damage liability.

Imbler v. Pachtman, supra, 424 U.S. at 428; *Gregoire v. Biddle, supra,* 177 F.2d at 581. Nevertheless, the extent of that sacrifice should not be overestimated.

An array of administrative and judicial remedies exists under Civil Service statutes and the Federal Tort Claims Act to provide compensation to the alleged victims of unlawful action. Indeed, in this very case, Fitzgerald initiated several administrative proceedings which resulted in his being reinstated to the Department of the Air Force with full backpay. Plaintiffs are also free to pursue non-judicial remedies.

Civil damage liability is unnecessary to deter Presidential misconduct. A decision upholding the form of absolute immunity historically available to Presidents would leave in place the full system of restraints relied on by the Framers of the Constitution. *See* pp. 23-24, *supra.* For serious offenses, "Treason, bribery, or other high crimes and misdemeanors," a President may be impeached. U.S. Const., Art. II, § 4. After impeachment, the President is also subject to criminal prosecution. U.S. Const., Art. I, § 3. As this Court has recently reaffirmed, Presidential actions are also subject to direct judicial review through equitable actions to restrain the inferior officials through whom he acts. *E.g., Dames & Moore v. Regan, supra.*

More important even than the threat of these formal adjudicatory procedures are restraints imposed by the political system. The system of checks and balances among co-equal branches, "buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose." *United States v. Brewster,* 408 U.S. 501, 523 (1972). *Brewster*'s reliance on the influence exercised by a free press applies with particular force to the President, whose actions are the subject of an unparalleled degree of attention. The President per-

forms his official actions in a "fish bowl," subject to the scrutiny of a full-time contingent of reporters, historical commentators, interest group representatives and other observers. Moreover, alone of all Executive officials, the President must account directly to the public in elections. In an analogous context, this Court emphasized that primary reliance should be placed on non-judicial restraints (*Tenney v. Brandhove, supra,* 341 U.S. at 378; footnote omitted):

> In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.

The same is true of the Presidency. There is no need to subject a President to actions by self-chosen "private attorney generals."

F. The Inadequacy Of Qualified Immunity

Qualified "good faith" immunity is not a sufficient guarantee of the public's interest in the "vigorous and fearless" performance of Presidential duties. That form of immunity is unavailable if the defendant (*e.g., Wood v. Strickland,* 420 U.S. 308, 322 (1975)):

> knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the rights of the [plaintiff], or * * * took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [the plaintiff].

This defense presents no obstacle whatever to a plaintiff at the pleading stage. *Bradley v. Fisher, supra,* 80 U.S. (13 Wall.) at 348; *Gomez v. Toledo,* 100 S. Ct. 1920 (1980). It cannot be resolved without full-blown discovery into the merits of the case, since it makes relevant the precise nature of the defendant official's actions, all

information on which he relied or failed to rely, and all surrounding circumstances. Finally, because qualified immunity ultimately focuses on an official's state of mind, it offers no realistic prospect of summary judgment and thus routinely exposes the official to a jury's judgment on his motives.[18]

As the author of the separate opinion in *Halperin v. Kissinger* correctly observed (606 F.2d at 1214):

> It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient.

An immunity of this nature, which does not offer any shield against the burdens of litigation and "may only be sustained after elaborate judicial inquiry into the circumstances under which an act was performed," is "of virtually no use." *Doe v. McMillan, supra,* 412 U.S. at 339 (Rehnquist, J., concurring and dissenting). *Accord, Tenney v. Brandhove, supra,* 341 U.S. at 377.

G. The Balance

Viewed together, these factors compel the conclusion that the "interests behind" absolute Presidential immunity fully justify its continued recognition. The President's unparalleled constitutional duties, his special vulnerability to suit, the *in terrorem* effect of ultimate

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[18]One final aspect of qualified immunity is also troublesome. To the extent that it focuses attention on the "reasonableness" of Presidential action, qualified immunity invites the involvement of other Presidents in litigation. The best witness as to what conduct is reasonable or unreasonable in light of the competing demands on a President is surely someone who has been under those same demands.

liability, and the burdens of litigation have supported Presidential immunity to date and still support it. The decisions of an elected and accountable President should be determined by his best assessment of the public interest and not, with a lawyer by his side, by the likelihood that a course of action might expose him to a personal claim for damages.

Recognition of absolute immunity for the official actions of a President does not rest on the premise that the President is "an omniscient leader cloaked in mystical powers," or that he is "above the law," as the D.C. Circuit has suggested, *Halperin v. Kissinger, supra,* 606 F.2d at 1213. Immunity reflects a principled choice, with its roots in the public interest, that dates far back into the English common law. Absolute immunity no more places the President "above the law" than it does the members of the two other Branches of the federal government who enjoy its protection. As Judge Hand held in *Gregoire v. Biddle, supra,* 177 F.2d at 581:

> The justification for [recognizing absolute immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.
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> * * *
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> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

We emphasize that this case does not involve a situation where Congress has examined the interests for and

against immunity and, on behalf of the public, has declared that the asserted interests on which absolute immunity has traditionally rested need not be given effect. *See United States v. Johnson*, 383 U.S. 169, 185 (1966) (reserving comparable issue in context of Speech or Debate Clause). Moreover, the civil damages remedies on which Fitzgerald relies—implied rights of action based on the First Amendment, 18 U.S.C. § 1505, and 5 U.S.C. § 7211—are wholly judicial in their origins. Finally, as petitioners Harlow and Butterfield persuasively demonstrate, this is also a case in which a well-developed system of Civil Service remedies has been available and in fact obtained by Fitzgerald. Without suggesting that these circumstances mark the boundaries of absolute Presidential immunity, they surely buttress the conclusion that the judiciary should not open the door (closed for nearly two hundred years) to damage actions against the President in this case.

IV.

ABSOLUTE PRESIDENTIAL IMMUNITY IS A PROPER MEANS OF SAFEGUARDING THE INTEGRITY OF THE EXECUTIVE BRANCH

The classic rationale for absolute immunity revolves around the negative impact of civil damage liability on an official's ability to conduct the public's business. Absolute Presidential immunity is also grounded in the need to preserve a balance between the three coordinate Branches of the federal government. If Presidents are not absolutely immune, their motives and thought processes will routinely be the subject of review by members of the Judiciary. A necessary consequence of civil liability will also be examination of the President's confidential communications. Because these necessary consequences of civil liability would threaten the balance between the Executive and Judicial Branches, absolute Presidential immunity should not be abrogated.

The principle of separation of powers is "essential to the successful working of" our Constitutional system. *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881). While this principle is no longer understood to require that "each of the three general departments of government [be] entirely free from the control or coercive influence, direct or indirect, of either of the others," *Humphrey's Executor v. United States, supra*, 295 U.S. at 629, it does mandate a "proper balance between the coordinate branches." *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). In the analogous context of the Speech or Debate Clause, this Court has noted the contribution that legislative immunity makes to the proper balance between the coordinate Branches. One of its purposes is "to prevent accountability before a possibly hostile judiciary." *E.g., United States v. Johnson, supra*, 383 U.S. at 179; *Gravel v. United States*, 408 U.S. 606, 617 (1972).

An important aspect of Congress' protection "from a possibly hostile judiciary" under the Speech or Debate Clause is its members' freedom from inquiry into the motivation for their legislative acts. *United States v. Brewster, supra*, 408 U.S. at 512; *United States v. Johnson, supra*, 383 U.S. at 184-85. The Court understood that such "judicial oversight" would "realistically threaten[ ] to control" a legislator's conduct, even if its stated purpose was to determine whether a member of Congress had violated a *criminal* statute. *Gravel v. United States, supra*, 408 U.S. at 618.

Absolute Presidential immunity from civil damage liability is appropriate to provide the Executive Branch with the same protection against intrusive judicial oversight of the President's motives. The more limited defense of qualified immunity throws open the motives and reasoning underlying all Presidential actions to investigation and the retrospective judgment of the

judiciary. *See* pp. 41-42, *supra*. Under those standards, a trial court and perhaps a jury must pass judgment on the validity of the President's motives. The qualified immunity defense thus necessarily "embroil[s] [judges and] juries in passing upon the intricacies of executive decisionmaking." *Halperin v. Kissinger, supra,* 606 F.2d at 1214 (Gesell, J.). Moreover, they do so with hindsight, and without an understanding of the pressures of the moment which prompted a President's actions.

A second related consequence of exposing the President to civil damage liability is to undercut the confidentiality of Presidential communications in a manner inconsistent with this Court's reasoning in *United States v. Nixon,* 418 U.S. 683 (1974). Where an ultimate issue is what the President "knew or reasonably should have known," discovery understandably focuses on all communications—written or oral—by which the President obtained knowledge of a matter. Served with a request for discovery seeking this information, a President is faced immediately with a Hobson's choice. He may waive the presumptive Presidential privilege, to the detriment of the public interest in confidentiality, in order to protect his personal estate, or he may invoke it at the risk of being denied the defense of qualified immunity due to the unavailability of evidence on one of its essential elements. If he invokes the privilege, the court then faces the difficult choice of whether to grant a plaintiff information concededly relevant to an issue in the case or to honor a generalized principle of confidentiality. These unavoidable circumstances work toward routine disclosure of Presidential communications, and thus undercut the very substantial separation-of-powers interests underlying the Presidential privilege. *United States v. Nixon, supra,* 418 U.S. at 705-06, 708, 715.

In the context of the Speech or Debate Clause, this Court has recognized the purpose of that privilege

as being "to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). Absolute immunity from civil liability for the Executive would serve the same goal for the same reasons.[19]

In closing, it is appropriate to rebut the D.C. Circuit's conclusion that *Butz v. Economou, supra,* not only frames the questions posed by this case, but also compels the conclusion that the President is entitled only to qualified immunity. As the analysis above demonstrates, there are a number of grounds distinguishing the President from the officials at issue in *Butz*. These include the dearth of suits against Presidents during the nearly 200 years following creation of that office, the President's status as the only executive official deriving authority from the Constitution and the repository of the "executive Power," the President's personal accountability to the public directly in periodic elections, the visibility of the office, and the magnitude of the responsibilities that the President is called upon to perform. These factors, and others discussed above, bring the President within explicit exceptions recognized

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[19]There is not, of course, a precise parallel between the protection afforded by the Speech or Debate Clause and absolute Presidential immunity. Most important, the Speech or Debate Clause protects against both civil and criminal proceedings.

The absence of an explicit reference to absolute Presidential immunity in the text of the Constitution does not, as the D.C. Circuit has indicated, *Halperin v. Kissinger, supra,* 606 F.2d at 1211, preclude its recognition as an incident of the principle of separation of powers. In resolving issues regarding that principle, it is customary to advert to the implications of the structure created by the Framers as well as the specific textual provisions by which they erected that structure. For instance, the privilege for Presidential communications was recognized as "inextricably rooted in the separation of powers under the Constitution," *United States v. Nixon, supra,* 418 U.S. at 708 (footnote omitted), although it is not referred to in the text.

in *Butz* for "officials whose special functions require a full exemption from liability" and "situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." 438 U.S. at 507-09 (footnote omitted). *Butz* cannot and should not be interpreted as foreclosing absolute immunity for all "executive" officials, except perhaps those performing functions that are somehow "judicial" in character.

V.

THE CLAIMS ASSERTED AGAINST FORMER PRESIDENT NIXON IN THIS CASE ARE PRECLUDED BY ABSOLUTE PRESIDENTIAL IMMUNITY

Under this Court's cases, the scope of an official's immunity is determined with regard to his duties and responsibilities. Immunity is available if an alleged action has "more or less connection with the general matters committed by law to his control or supervision," as opposed to "matters which are manifestly or palpably beyond [an official's] authority." *Spalding v. Vilas*, 161 U.S. 483, 498 (1896). *See Barr v. Matteo, supra*, 360 U.S. at 575 (plurality opinion) (it is enough that the action "was within the outer perimeter of [the official's] line of duty"); *id.* at 577-78 (Black, J., concurring) (it is enough that the action was not "plainly beyond the scope of [the defendant's] official business, but instead related more or less to general matters committed to his control and supervision").

These standards are formulated broadly in order to assure that the determination of whether a claim falls within the scope of an official's immunity does not collapse into the merits of the claim against him. "[A]ny allegation that an official, acting under color of law, has deprived someone of his rights necessarily implies that, in the particular case, the official exceeded his authority. Such logic would completely abrogate the doctrine of

immunity." *Briggs v. Goodwin*, 569 F.2d 10, 15 (D.C. Cir. 1977) (footnote omitted), *cert. denied*, 437 U.S. 904 (1978). *Accord, Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978).

Fitzgerald's case rests on the allegations that former President Nixon "approved" the abolition of his job, either before or after Secretary Seamans signed the operative order, and that Mr. Nixon subsequently invoked executive privilege to "cover up" White House involvement in the termination. R. 308, pp. 7-11. Without conceding the validity of these allegations, it is clear that all actions attributed by Fitzgerald to Mr. Nixon met the standards outlined above. Former President Nixon had the statutory authority to "prescribe" the manner in which Secretary Seamans would "conduct the business of the Department [of the Air Force]," 10 U.S.C. § 8012(b), and Seamans in turn had authority to fill the "Schedule A" civil service position held by Fitzgerald, replace its current occupant or reorganize the agency to abolish it. *See* 10 U.S.C. § 8012(e) (authorizing Secretary of the Air Force to "assign, detail and prescribe the duties of * * * civilian personnel"); 5 C.F.R. § 6.3.[20] Mr. Nixon's alleged "approval" of Fitzgerald's termination was thus within his statutory authority to "prescribe" Seamans' management of the Air Force. *See National Treasury Employees Union v. Reagan*, No. 81-1294 (D.C. Cir. August 11, 1981), slip op. at 17.[21] Invocation of executive privilege for White House communications

[20] Fitzgerald's "Schedule A" position (which was constituted by 5 C.F.R. § 213.3109(a)) is in the "excepted" civil service—*i.e.*, is not filled through the competitive procedures followed in the career civil service and is not tenured. 5 U.S.C. §§ 2102-03. The officials in such positions are appointed by the head of the agency involved, in Fitzgerald's case, the Secretary of the Air Force.

[21] The district judge ignored 10 U.S.C. § 8012(b) in concluding that "the President had no authority to hire, discharge or interfere with the employment of an employee such as Fitzgerald." JA 57a.

is also a matter committed to the President's authority. *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

It is immaterial, for purposes of the immunity defense, that Fitzgerald has also alleged that actions by former President Nixon were taken for the unlawful purpose of penalizing the exercise of constitutional rights. An alleged action otherwise entitled to immunity does not lose that protection simply because it is alleged to have been taken "maliciously" or for some improper purpose. *E.g., Spalding v. Vilas, supra*, 161 U.S. at 499; *Bradley v. Fisher, supra*, 80 U.S. (13 Wall.) at 349-50; *Pierson v. Ray, supra*, 386 U.S. at 554; *Barr v. Matteo, supra*, 360 U.S. at 575. If Presidential immunity is to perform its function, it must not be allowed to depend on the issue of whether a President's action was wrongfully motivated, and thus legally unauthorized in some narrow sense. Such allegations are the easiest to make and, if allowed to defeat immunity, would undercut the historical, policy-oriented, and constitutional grounds for the privilege.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss the plaintiff's Second Amended Complaint with prejudice.

Respectfully submitted,

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